U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 January 2006

CASE NOS.: 2005-LDA-16
2005-LDA-17

OWCP NOS.; 02-137098
02-137099

IN THE MATTER OF

GERALD TALBOT,
Claimant
v.

SERVICE EMPLOYERS INTERNATIONAL,
Employer

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
Carrier

APPEARANCES:

Quentin D. Price, Esq.
On behalf of Claimant

Jerry R. McKenney, Esq.
On behalf of Employer/Carrier

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This is a claim for benefits under the Longshore and Harbor Worker's Compensation Act (the Act), 33 U.S.C. § 901, et seq., as extended by the Defense Base Act, 42.U.S.C. § 901,et seq.,

brought by Gerald Talbot (Claimant) against Service Employers International, Inc.,(Employer) and Insurance Company of the State of Pennsylvania (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on August 22, 2005 in Beaumont, Texas.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced 25 exhibits which were admitted including various DOL forms, deposition, records and curriculum vitae of Ms. Cassy Rhoades, deposition and medical records of Dr. Douglas Waldman, deposition and medical records of Dr. Rama Nayini, report Mr. Daniel Shea, medical records from Marshal Regional Medical Center, Kellogg, Brown and Root health records, Claimant's pre-employment physical. personnel file and wage records, Employer's response to interrogatories and request for production of documents, portions of the ***Diagnostic and Statiscal Manual of Mental Disorders, 4th Ed.***, photographs, Employer job description and operational policies.[1] Employer called one live witness, Dr. John Dorland Griffith, psychiatrist and introduced 13exhibits which were admitted including Claimant's pre-employment physical and wage records, injury report, medical records and deposition of Dr. Nayini, deposition of Dr. Douglas Waldman, reports of Wallace Stanfill, Drs. Griffin, David Vanderweide, and declaration of Daniel Shea.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor, and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. There was an Employer\Employee relationship at the time of the alleged accident.

2. Employer filed Notices of Controversion on October 18, 2004 in both cases.

3. An informal conference was held on January 6, 2005.

4. Employer paid no compensation in these cases.

II. ISSUES

The following unresolved issues were presented by the parties:

[1] References to the transcript and exhibits are as follows: trial transcript- Tr.____; Claimant's exhibits- CX-___, p.___; Employer exhibits- EX-___, p.___; Administrative Law Judge exhibits- ALJX-__; p.___.

1. Fact and date of injury: Whether Claimant suffered a right shoulder injury and PTSD as a result of truck accident of January 5, 2004, and whether Claimant contracted pneumonia on or about June 29, 2004 as a result of his work in Iraq.

2. Injury in course and scope of employment.

3. Nature and extent of disability.

4. Date of maximum medical improvement.

5. Section 7 medical benefits.

6. Average weekly wage.

7. Attorney fees, penalties, and interest.

III. STATEMENT OF THE CASE

A Claimant's Testimony

Claimant is a 51 year old male born on August 13, 1954 with a high school education and past work as an auto painter and body repairer and over-the-road truck driver. (Tr. 19-20). Employer hired Claimant as an overseas truck driver on December 14, 2003. (CXs-15, 16). His duties included loading, transporting and unloading hazardous materials for the military, changing flat tires, and fueling trucks. (CX-16, p. 5, Tr. 25). Claimant was employed from December 14, 2003 through July 2, 2004 in which he made $49,273.18. (CX-17). Prior to being employed Claimant underwent and passed a physical. (CX-14, Tr. 20, 21). When initially hired Claimant was told he would drive a tanker truck. However, upon arrival in Iraq he was assigned to drive a flatbed delivering supplies for the Marines and 82nd Airborne. (Tr. 22).

Claimant testified that he drove two routes (Jackson and Tampa) from Camp Cedar to Camp Anaconda with a fuel stop in Scania. Employer instructed Claimant to remain in the convoy for safety while warning them about IEDs (improvised explosive devices) and RPGs (rocket propelled grenades). Claimant usually made the run from Camp Cedar to Camp Anaconda in one day with a return the following day unless fighting prevented travel in which case transport would cease until the area had been stabilized. (Tr. 23, 24). Claimant would typically get up at 4 a.m. and drive between 12-18 hours.

Claimant testified that he was shot at almost every day or exposed to IEDs and like other drivers had bounties place on their heads higher than the military. (Tr. 26, 27). After Christmas 2003, convoy attacks escalated with insurgent using a combination of IEDs, mortars, and RPGs.

(Tr. 29, 30). Employer instructed Claimant to follow orders from the military who in turn told Claimant and other drivers to continue driving despite attempts by Iraqis to stop the convoy by throwing boulders and pushing carts and people in front of the trucks. (Tr. 32, 33). Typically the convoys would consist of 15 to 30 trucks. (Tr. 38).

On January 5, 2004, Claimant was driving south from Camp Anaconda and approaching a bridge when a 50 pound mortar exploded blowing out the windows of his truck. The military evacuated Claimant and other injured personnel by hummer to Scania where Claimant was treated for left leg and rib pain and lacking of hearing and blood in the left ear. (Tr. 40). Claimant was driven to Camp Cedar where they gave him 800 milligrams of Motrin and told to stay in his tent for a few days. (Tr. 41). Claimant took off 4 days and then resumed driving. (Tr. 43). [2]

Claimant testified he had continued problems with his ear and headaches and allegedly had pain in his shoulder but did not report these problems to the medic. (Tr. 44). In all Claimant saw a doctor only once in Iraq immediately after the accident and then saw medics on three occasions during which he received shots of antibiotics, and Tavist D. (Tr. 47). Claimant testified that before leaving Iraq on June 29, 2004, he had breathing problems and was "sick as a dog". (Tr. 49). Upon returning to the States he was hospitalized for two days, found dehydrated and with pneumonia. Sometime thereafter Claimant complained about shoulder, ear and neck pain and was referred to Drs. Nayini and Waldman. Dr. Waldman gave Claimant a shot of cortisone which cleared up the shoulder problem for a week. Claimant testified that he has not returned to Dr. Waldman because of an alleged inability to pay. (Tr. 52). Dr. Nayini administered a breathing test, put Claimant on inhalers and told him to come back in 4 months which Claimant has not done because of an alleged inability to pay. (Tr. 53).

Thereafter Claimant saw counselor, Cassy Rhoades on several occasions on a referral from Cigna for PTSD. (Tr. 54). Claimant complained about not wanting to leave his house, inability to get along with his family and not feeling safe but could not recall when he began experiencing these feelings. (Tr. 55). Allegedly these symptoms escalated upon Claimant's return to the U.S. making him stay at home, having nightmares about people running around with burning faces and being annoyed by noises. (Tr.56, 57). Allegedly Ms. Rhoades treatment has

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[2] Claimant's medical records from Iraq show Claimant being treated for a sough and sore throat on December 28, 2003. Claimant was next treated on January 5, 2004 for the convoy attack in which he sustained minor tenderness of the left ribs, elbow and lower leg and was cleared by army medics and physician and instructed to seek medical attention if he had continuing problems. (CX-13). On February 15, 2004 and June 21, 2004 Claimant was treated for sinus and chest congestion. Upon returning to the U.S. on July 3, 2004 he was treated and diagnosed at Marshall Regional Medical Center for right middle lobe pneumonia for which he received antibiotics. On July 26, 2004 Claimant had shoulder s-rays which were normal. However a right chest x-ray showed a right pulmonary nodule which was later identified as two nodular but benign opacities. A subsequent right shoulder MRI showed mild supraspinatus tendonitis and subacromial subdeltoid bursitis with type 3 acromion and arthritic AC joint narrow and arthritic acrdomioclavicular joint with edema. (CX-12).

provided significant relief. Yet his shoulder and mental problems prevent him from driving. (Tr. 58). Claimant seeks follow up care for PTSD at Brentwood in Longview, shoulder treatment by Dr. Waldman and lung treatment. (Tr. 61-63).

On cross Claimant admitted he could drive his car where and when he needed, cook and dress himself, do some yard work , make minor auto repairs. (Tr. 65, 66). As a result of the truck incident Claimant missed only 4 work days. Claimant received acceptable care from the KBR medics. (Tr. 67). Claimant allegedly told the doctor (a lieutenant colonel) who treated him in Scania after the truck incident all his ailments yet there is no mention of ear problems or headaches in his report. (Tr. 69, 70). Following the truck incident, Claimant returned to his regular duties for 6 months. (Tr. 74, 75). The next time he saw a medic was on February 15, 2004. Claimant denied having ear pain. (Tr. 77, 78). Moreover, the records do not show any complaints of shoulder pain or nightmares. (Tr. 79, 80). Claimant quit on June 27, 2005 when assigned to night convoy operations. Upon returning to the U.S. Claimant has not sought any employment and continues to smoke a pack a day which he has done for the past 30 years. (Tr. 81, 82).

In addition to nightmares about burning faces, Claimant testified he has nightmares about driving a big truck off a cliff. (Tr. 84). He also admitted rear ending the truck in front of him. (Tr. 87).

C. Testimony of Ms. Cassy Rhoades and Dr. John D. Griffith

Ms. Rhoades, a licensed professional counselor in Texas with a master's degree in community counseling (CX-6) is engaged in private family and individual counseling in Marshall, Texas since 2000. She has limited experience treating individuals with PTSD and depression. (CX-4, pp.6, 7, 30). Ms. Rhoades testified that she first saw Claimant on August 4, 2004 during which Claimant complained of flashbacks and depression. (Id. at 9). The session lasted 1 ½ hours. Claimant described his experiences in Iraq including his orders not to stop when driving and attempted robberies. Ms. Rhoades performed no testing but nonetheless concluded Claimant had PTS syndrome. (Id. at 14, 15). Thereafter, Ms. Rhoades saw Claimant on August 12, 2004 during which he was complaining of flashbacks and nightmares. Thereafter she saw Claimant on 25 occasions and concluded Claimant suffered from a major depressive disorder as well. (Id. at 17, 27, 96, 97, 98; CX-5).

Ms. Rhoades opined that when she first saw Claimant he could not work because of an inability to drive, make good decisions and having flashbacks. (CX-4, p. 21). Ms. Rhoades continues to believe Claimant cannot work for the same apparent reasons. (Id. at 23). Ms. Rhoades has no objective evidence to support any of Claimant's alleged symptoms and has never considered the issue of secondary gain in her analysis or treatment of Claimant. (Id. at 43, 50, 51) [3]

[3] Claimant submitted a two page report form licensed professional counsel, Daniel J. Shea dated December 6, 2004 in which Mr. Shea says that Claimant was evaluated at a Brentwood facility, found to be suffering from depression, inappropriate anger, intrusive thoughts, flashback from

Dr. Griffith, a board psychiatrist with an extensive record of treatment of patients with PTSD (post-traumatic stress disorder) and depression, (Tr. 90-93), testified that he studied Claimant's medical records and observed him while testifying and stated that he was not given the opportunity to either interview him or administer psychological tests and therefore was unable to "form a reasonable judgment" or diagnosis.[4] However he noted that the counselor treating Claimant, Cassy Rhoades, never ruled out by either interview or psychological testing the presence of factitious or malingering as required for a determination of PTSD. (Tr. 96).

Concerning her treatment of Claimant, Dr. Griffith testified that Ms. Rhoades merely listened to Claimant encouraging him to adopt a sick roll and never confronted him about not attempting to work while giving him a book listing the symptoms of PTSD. (Tr. 97, 98). Further Ms. Rhoades never referred Claimant to places where he could receive free medications and wrongly diagnosed PTSD on the basis of just symptoms instead of testing. (Tr. 99, 102).

Dr Griffith questioned the PTSD diagnosis because: (1) Claimant never complained of it in Iraq; (2) Claimant drove a truck one day and then suddenly was unable to do it; (3) patients with PTSD are rarely disabled from this condition but from depression; (4) Claimant has not attempted a normal life and made no effort to find work; (5) the presence of secondary gain; and, (6) Claimant did not testify about flashbacks and had non-symbolic nightmares. (Tr. 104-108) Dr. Griffith recommended further psychological or psychiatric testing followed by proper treatment if warranted. (Tr. 109).

Following the hearing the parties were given additional time to conduct appropriate testing. However, the evaluators chosen by Claimant declined to accept the assignment. Claimant rejected the evaluators chosen by Employer. The result is that Claimant's alleged mental condition remains untested and unconfirmed.

D. Testimony of Drs. Douglas Waldman, Rami Nayini, and medical report of Dr. David Vanderweide

Dr. Waldman, an orthopedist, who saw Claimant on October 8, 2004 on a referral from Claimant's primary care physician, Dr. Kimberly Barbolla, testified that on this visit which was the only time he saw Claimant that Claimant reported being attacked while driving in a military convoy, stopping short, and injuring his right shoulder. (CX-8). Claimant told Dr. Waldman he

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being in Iraq and unable to work because of significant problems in concentration, decision making, interpersonal interactions, feelings of guilty and worthlessness. The report fails to document any testing or evaluations by a clinical psychologist or psychiatrist, and thus, any medical basis for his conclusions.

[4] Employer's counsel requested two weeks before trial for an IME by Dr. Griffith. Claimant refused to participate. (Tr. 103).

had previous left shoulder problems but they had resolved. (CX-7, p. 6). On exam Claimant had limited abduction of the right shoulder due to pain but showed no instability and discomfort at the AC joint. X-rays of the AC joint showed arthritis rather than trauma. (Id, at 8-10). An MRI showed mild supraspinatus tendonitis, subacromial and subdeltoid bursitis. Dr. Waldman was unable to tell when this condition started other than to rely upon what Claimant said. Dr. Waldman injected Claimant with steroids which produced considerable relief and almost completely restored the range of motion. (Id. at 13). Dr. Waldman characterized Claimant's bursitis as a combination of trauma and degeneration but was unable to determine a course of treatment because Claimant never returned. (Tr. 14). However, treatment for such a condition can involve physical therapy, anti-inflammatory medication and possible surgery.

Dr. Waldman testified that the bursitis should have manifested itself with two or three weeks after the truck incident and not six months later. Further, patients normally seek out medical care when it becomes symptomatic because the condition once it occurs is impossible to ignore. (Id. at 15, 16). Dr. Waldman testified that assuming the injection wore off and symptoms returned, he would be restrict Claimant from climbing ladders, lifting and loading a truck or overhead work due to severe pain. (Id. at 26). Also Dr. Waldman would have restricted Claimant from driving large 18 wheeler, but could drive a small truck. (Id. at 27).

Dr. Nayini, a certified internist and pulmonologist, who treated Claimant on a referral from Dr. Susan Kemp, testified that she initially saw Claimant on August 11, 2004 at which time Claimant complained of being sick since December 2, 2003; dry coughing with mild dyspnea on moderate exertion since June 2, 2004; and having fever, coughing up phlegm, and chest congestion prior to his arrival in the U.S. on July 2, 2004. Dr. Nayini examined Claimant and found no evidence of pneumonia. (CX-9, pp. 5, 6, 18, 19; CX-10). Claimant did not complain about shoulder pain, insomnia or depression. (CX-9, pp. 7, 8). Claimant had a 30 year history of significant smoking. Claimant underwent pulmonary function testing which revealed mild obstructive airway dysfunction. A lung CT showed two lesions of right mid lung which were benign. (Id. at 36-48).

Dr. Nayini was unable to tell whether Claimant's coughing was due to smoking, acute bronchitis or pneumonia (Id. at 10, 11) However, as of August 11, 2004, Claimant was not experiencing any residual breathing problems with no evidence of any traumatically induced lung condition and any disability. (Id. at 13-16, 51). On cross Dr. Nayini admitted that medical records from Marshall Regional Medical Center show Claimant with either viral or bacterial pneumonia on July 3, 2004 which condition she was not able to tell where it occurred. (Id. at 25,53-62, 72). She also admitted that it was possible Claimant had residual infiltrates from either smoking or pneumonia. (Id. at 26).

Dr. Vanderweide was scheduled to examine Claimant on behalf of Employer. However, the examination was cancelled immediately prior to assessment. Nonetheless, Dr. Vanderweide reviewed the medical records and agreed with Dr. Waldman's assessment that the onset of pain following a significant shoulder injury would be acute and not delayed several months. Moreover, a significant shoulder injury would have limited Claimant's work even if the injury involved a non dominant upper extremity with the MRI findings not consistent with 6 months of gradual increased pain and discomfort. (EX-12).

IV. DISCUSSION

A. Contention of the Parties

Claimant is seeking temporary total disability from July 3, 2004, his last date of employment with Employer through the present and continuing based upon a right shoulder injury and PTSD of January 5, 2004 which combined with pneumonia in June, 2004, to render Claimant unable to drive a truck. Claimant contends that an appropriate average weekly wage (AWW) is $1,707.49 based on the average weekly earnings he made when working for Employer while in Iraq. ($49,273 divided by 28,857 weeks of employment). This results in the maximum compensation rate of $2,030.78. Claimant also seeks follow-up medical treatment for his lungs, right shoulder bursitis, and PTSD as recommended by Drs. Nayini, Waldman, and counselors Ms. Rhoades and Mr. Shea of the Brentwood Facility. In its brief Claimant also seeks payment for Ms. Rhoades services as well as additional medical bills set forth in CX-18. Those bills include shoulder MRIs of August 9, 2004; chest CT of July 29, 2004; chest X-ray of July 3, 2004; brain CT of July 3, 2004; chest and shoulder X-ray of July 26, 2004.

Employer contends that contemporaneously created medical records, plus Claimant's treating physician, independent examining physician, and Claimant's own conduct contradict the allegation of right shoulder injury. Dr. Waldman examined Claimant and found no evidence of shoulder trauma, but rather, naturally occurring arthritis and noted that had Claimant injured his right shoulder on January 5, 2004 as alleged pain would have been manifest with two to three weeks and not 6 months later, and further, that Claimant would have sought treatment for such pain while in Iraq. Dr. Vanderweide also noted that contemporaneous medical record were devoid of right shoulder complaints, agreed with Dr. Waldman on pain manifestation and stated that the MRI findings were consistent with a mild pre-existing condition rather than 6 months post trauma and pain.

Concerning Claimant's lung nodules or pneumonia, Employer contends that Claimant failed to prove such were caused by anything in Iraq and in any event were not disabling. Employer notes that the chest x-rays of July 3, 2004 and July 29, 2004 followed by Dr. Nayini's exam of August 3, 2005 showed no evidence of pneumonia, but rather increased pulmonary function over pre-employment testing. Further according to Dr. Nayini Claimant's lung nodules could have been caused just as likely by Claimant's smoking as opposed to pneumonia, the source of which Dr. Nayini was unable to determine.

Concerning PTSD Employer contends that Claimant's testimony contracts this proposed diagnosis with Claimant failing to meet appropriate diagnostic criteria for such illness Claimant never underwent psychological or psychiatric testing to confirm the diagnosis. Ms. Rhoades had no objective basis for concluding that Claimant had such a condition let alone conclude such was disabling. Claimant's admitted conduct is inconsistent with Ms. Rhoades opinion that Claimant is disabled. Further, Dr. Griffith found Claimant's conduct inconsistent with PTSD with the Brentwood letter of Mr. Shea devoid of proper testing or mental status examination.

B. Credibility of Parties

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. ***Banks v. Chicago Grain Trimmers Association, Inc.*****,** 390 U.S. 459, 467 (1968); ***Louisiana Insurance Guaranty Ass'n v. Bunol*****,** 211 F.3d 294, 297 (5th Cir. 2000); ***Hall v. Consolidated Employment Systems, Inc.*****,** 139 F.3d 1025, 1032 (5th Cir. 1998); ***Atlantic Marine, Inc. v. Bruce*****,** 551 F.2d 898, 900 (5th Cir. 1981); ***Arnold v. Nabors Offshore Drilling, Inc.*****,** 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole ***Banks***, 390 U.S. at 467, 88 S. Ct. at 1145-46; ***Mijangos v. Avondale Shipyards, Inc***., 948 F.2d 941, 945 (5th Cir. 1991); ***Huff v. Mike Fink Restaurant, Benson's Inc.***, 33 BRBS 179, 183 (1999).

In this case I do not credit Claimant's assertions of right shoulder, ear pain, headaches or PTSD problems as a result of the January 5, 2004 convoy attack. First none of the medical records from Iraq confirm any of these alleged problems Except for a period of 4 days which Claimant took off following the incident Claimant performed his regular driving duties without any problems or symptoms. Claimant has demonstrated no apparent effort to find work following his return from Iraq despite minimal evidence of any continuing medical problems. I also do not credit Claimant's assertion that he was "sick as a dog" prior to leaving Iraq for there are no medical records to show any treatment or complaints there.

On the other hand, I was impressed with the testimony of Drs. Griffith, Waldman, Nayini, and the report of Dr. Vanderweide. Dr. Griffith rightly questioned the PTSD diagnosis because of Claimant's lack of symptoms in Iraq, his ability to work over there, his lack of effort to attempt work in the U.S., the presence of secondary gain, and his testimony on the stand. Dr. Waldman found bursitis but doubted it was caused by the convoy incident due to the lack of pain complaints until 6 months later. Dr. Vanderweide agreed with Dr. Waldman and found it unlikely that Claimant injured his shoulder in Iraq because of Claimant's admitted ability to perform all his job duties without a problem while employed from January through June 2004. Dr. Nayini found no evidence of pneumonia when she examined Claimant and was unable to determine whether Claimant's lung problems had anything to do with his employment and even if so found no work related restrictions.

C. Causation

Section 2(2) of the Act defines injury as accidental injury or death arising out of or in the course of employment. 33 U.S.C. § 902(2) (2003). Section 20(a) of the Act provides a presumption that aids the claimant in establishing that a harm constitutes a compensable injury under the Act:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary - -
>
> (a) That the claim comes within the provisions of this chapter.

33 U.S.C. § 920(a) (2003).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. ***Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*****,** 227 F.3d 285, 287 (5th Cir. 2000); ***Kier v. Bethlehem Steel Corp.*****,** 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. ***Hunter***, 227 F.3d at 287. [T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer. ***U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*****,** 455 U.S. 608, 615, 102 S. Ct. 1312, 71 L. Ed. 2d 495 (1982). *See also* ***Bludworth Shipyard Inc., v. Lira*****,** 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege an injury arising out of and in the course and scope of employment); ***Devine v. Atlantic Container Lines*****,** 25 BRBS 15, 19 (1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer and a *prima facie* case must be established before a claimant can take advantage of the presumption). Once both elements of the *prima facie* case are established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. ***Hunter***, 227 F.3d 287-88.

In order to show harm or injury a claimant must show that something has gone wrong with the human frame. ***Crawford v. Director, OWCP*****,** 932 F.2d 152, 154 (2nd Cir. 1991), ***Wheatley v. Adler*****,** 407 F.2d 307, 311-12 (D.C.Cir. 1968); ***Southern Stevedoring Corp., v. Henderson*****,** 175 F.2d. 863, 866 (5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event or episode, and while a claimant's injury need not be caused by an external force, something still must go wrong within the human frame. ***Adkins v. Safeway Stores, Inc.*****,** 6 BRBS 513, 517 (1978). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. ***Gooden v. Director, OWCP,*** 135 F.3d 1066, 1069 (5th Cir, 1998)(pre-existing heart condition; ***Kubin v. Pro-Football, Inc.*****,** 29 BRBS 117, 119 (1995) (pre-existing back injuries).

Although a claimant is not required to introduce affirmative medical evidence establishing that working conditions caused the harm, a claimant must show the existence of working conditions that could conceivably cause the harm alleged beyond a mere fancy or wisp of what might have been. ***Wheatley***, 407 F.2d 307, 313 (D.C. Cir. 1968). A claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. ***Hampton v. Bethlehem Steel Corp.***, 24 BRBS 141, 144 (1990) (finding a causal link despite the lack of medical evidence based on the claimant's reports); ***Golden v. Eller & Co***., 8 BRBS 846, 849 (1978), ***aff'd*****,** 620 F.2d 71 (5th Cir. 1980) (same). On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a *prima facie*

case that the injury occurred in the course and scope of employment, or that condition existed at work that could have caused the harm. ***Bonin v. Thames Valley Steel Corp.***, 173 F.3d 843 (2nd Cir. 1999) (unpub.) (upholding ALJ ruling that the claimant did not produce credible evidence that a condition existed at work which could have cause his depression); ***Alley v. Julius Garfinckel & Co.,*** 3 BRBS 212, 214-15 (1976) (finding the claimant's uncorroborated testimony on causation not worthy of belief); ***Smith v. Cooper Stevedoring Co.***, 17 BRBS 721, 727 (1985) (ALJ) (finding that the claimant failed to meet the second prong of establishing a *prima facie* case because the claimant's uncorroborated testimony linking the harm to his work was not supported by the record).

For a traumatic injury case, the claimant need only show conditions existed at work that could have caused the injury. Unlike occupational diseases, which require a harm particular to the employment, ***Leblanc v. Cooper/T. Stevedoring, Inc.***, 130 F.3d 157, 160-61 (5th Cir. 1997) (finding that back injuries due to repetitive lifting, bending and climbing ladders are not peculiar to employment and are not treated as occupational diseases); ***Gencarelle v. General Dynamics Corp.***, 892 F.2d 173, 177-78 (2nd Cir. 1989) (finding that a knee injury due to repetitive bending stooping, squatting and climbing is not an occupational disease), a traumatic injury case may be based on job duties that merely require lifting and moving heavy materials. ***Quinones v. H.B. Zachery, Inc.***, 32 BRBS 6, 7 (2000), ***aff'd on other grounds***, 206 F.3d 474 (5th Cir. 2000). A claimant's failure to show an antecedent event will prohibit the claimant from establishing a *prima facie* case and his entitlement to the Section 20 presumption of causation.

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." ***Conoco, Inc., v. Director, OWCP***, 194 F.3d 684, 687-88 (5th Cir. 1999). To rebut the presumption of causation, the employer is required to present *substantial evidence* that the injury was not caused by the employment. ***Noble Drilling v. Drake***, 795 F.2d 478, 481 (5th Cir. 1986). The Fifth Circuit described *substantial evidence* as a minimal requirement; it is "more than a modicum but less than a preponderance." ***Ortco Contractors, Inc., v. Charpentier***, 332 F.3d 283, 290 (5th Cir. 2003) *cert. denied* 124 S.Ct. 825 (Dec. 1, 2003). The Court went on to state an employer does not have to rule out the possibility the injury is work-related, nor does it have to present evidence unequivocally or affirmatively stating an injury is not work-related. "To place a higher standard on the employer is contrary to statute and case law." *Id.* at 289-90 (citing ***Conoco, Inc.,*** 194 F.3d at 690). ***See Stevens v. Todd Pacific Shipyards Corp.***, 14 BRBS 626, 628 (1982), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983)(stating the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); ***Holmes v. Universal Maritime Serv. Corp.***, 29 BRBS 18, 20 (1995)(stating that the unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption.).

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. ***Del Vecchio v. Bowers***, 296 U.S. 280, 286-87 (1935); ***Port Cooper/T Smith Stevedoring Co.***, 227 F.3d at 288; ***Holmes***, 29 BRBS at 20. In such cases, I must weigh all of the evidence relevant to the causation issue. If the record

evidence is evenly balanced, then the employer must prevail. ***Greenwich Collieries*****,** 512 U.S. at 281.

In the present case I find that Claimant failed to establish a *prima facie* case of injury. I do not credit his testimony of alleged shoulder, ear, headache, and PTSD problems from the January, 2004, convoy attack for the foregoing reasons. I also do not credit his complaints of being sick prior to his arrival in the U.S. While Claimant received a provisional diagnosis of pneumonia on July 3, 2004, the cause of that condition was undetermined and resulted in no restrictions or work impairments.

Assuming *arguendo* that Claimant did somehow establish a *prima facie* of disability, Employer fully rebutted the Section 20 (a) presumption. Upon weighing the entire record, I find that the preponderance of evidence weighs in favor of Employer and as such Claimant has failed to show that his employment in Iraq resulted in compensable injuries.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

IT IS HEREBY ORDERED that the instant claim is denied as lacking merit.

A

CLEMENT J. KENNINGTON
Administrative Law Judge